

FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

**FEDERAL ELECTION COMMISSION**

999 E Street N.W.

Washington, D.C. 20463

**SENSITIVE**

2012 APR 10 P 3:51

**FIRST GENERAL COUNSEL'S REPORT**

**MUR 6500**

**DATE ORIGINAL COMPLAINT AND**

**AMENDED COMPLAINT RECEIVED:**

**09/23/2011**

**DATE SECOND AMENDED COMPLAINT**

**RECEIVED: 10/4/2011**

**DATE OF NOTIFICATIONS: 09/19/2011 &**

**10/14/11**

**LAST RESPONSES RECEIVED: 12/5-6/2011**

**DATE ACTIVATED: 1/11/2012**

**EXPIRATION OF SOL: 8/22/2016- 09/26/2016**

**COMPLAINANT:**

**Bill Beddoes**

**RESPONDENTS:**

**The American Way – Durant 2012 and Walter  
Czarnecki, in his official capacity as treasurer**

**W. Clark Durant, in his individual capacity**

**New Common School Foundation**

**Cornerstone Schools Association**

**RELEVANT STATUTES  
AND REGULATIONS:**

**2 U.S.C. § 441b(a)**

**11 C.F.R. § 109.21**

**11 U.S.C. § 114.2(c)**

**11 C.F.R. § 114.4(c)(6)**

**11 C.F.R. § 114.4(c)(7)(i)**

**INTERNAL REPORTS CHECKED:**

**FEC Database**

**FEDERAL AGENCIES CHECKED:**

**I. INTRODUCTION**

**This matter involves allegations that two non-profit corporations, New Common School  
Foundation ("NCSF") and Cornerstone Schools Association ("CSA"), made prohibited in-kind**

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CELA

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1 contributions to The American Way – Durant 2012 and Walter Czarnecki, in his official capacity  
2 as treasurer (“Committee”), the principal campaign committee for U.S. Senate candidate  
3 W. Clark Durant. Durant is the current President and a Board of Director member of NCSF, and  
4 currently serves as the “Founding Chair” and a Board of Director member of CSA.

5 The complaints (original, amended, and second amended) allege that CSA, NCSF, and  
6 the Committee violated 2 U.S.C. § 441b(a) by making and receiving prohibited in-kind corporate  
7 contributions as a result of: 1) NCSF’s payment for legal advice regarding any possible conflict  
8 of interest arising from Durant being a candidate while continuing to be an NCSF officer;<sup>1</sup>  
9 2) a CSA television advertisement promoting the school across the state; 3) an email sent by  
10 CSA’s President and CEO, Ernestine Sanders, to its “partners” and “friends” inviting them to  
11 attend a regularly scheduled meeting, during which Durant announced his candidacy;<sup>2</sup> 4) the  
12 Committee’s use of CSA’s facility for announcing Durant’s candidacy; and 5) the Committee’s  
13 use of video materials from CSA’s YouTube page in one of its campaign mailers.

14 All respondents were notified of the complaint and amendments, and responses were  
15 filed on behalf of Durant and the Committee (“Committee Response”) and on behalf of CSA and  
16 NCSF (“Joint Response”). As set forth below, Respondents deny the allegations. Respondents,  
17 however, did not address the allegation regarding the CSA television advertisement included in  
18 the original complaint but not included in the subsequently filed amended and second amended  
19 complaints.

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<sup>1</sup> Complainant also alleges that the NCSF Board, of which Durant is a member, violated 11 C.F.R. § 114.2(f)(1) by facilitating the making of a prohibited corporate in-kind contribution; and that Durant, as a NCSF Board member, violated 11 C.F.R. § 300.61 by unlawfully directing the use of non-federal funds to benefit his federal candidacy.

<sup>2</sup> In addition, the Complainant alleges that CSA’s purported endorsement of Durant through the email invitation constitutes an impermissible communication of an endorsement to the general public in violation of 11 C.F.R. § 114.4(c)(6)(i) and (ii).

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For the reasons discussed below, we recommend that the Commission find no reason to believe the Respondents violated the Act.

## **II. FACTUAL BACKGROUND**

NCSF is a Michigan non-profit corporation whose stated primary purpose is to “explore educational methodologies that enhance performance throughout the public educational system.”

Joint Response at 2. Durant is the current President and serves on its Board of Directors. *Id.*

CSA is a Michigan non-profit corporation that operates as a group of charter and independent

schools in Detroit. *Id.* Durant currently serves as its “Founding Chair” and a Board of Director

member. *Id.* On August 8, 2011, Durant filed his Statement of Candidacy with the Commission.

The American Way – Durant 2012 is Durant's principal campaign committee and its treasurer is

Walter Czarnecki.

On August 22, 2011, Durant was quoted in a newspaper article as stating that the NCSF

would consult with its legal counsel to ensure that there was no conflict between Durant's

continued presidency of NCSF and his Senate candidacy. *See* Original Complaint at 5, Ex. C.

Complainant alleges that NCSF's payment for these legal services and Durant's acceptance of

the legal services at the expense of NCSF constitutes the making and receipt of a prohibited in-

kind corporate contribution. *Id.* In addition, the complaint alleges that the NCSF Board, of

which Durant is a member, facilitated the making of a prohibited in-kind corporate contribution

in violation of 11 C.F.R. § 114.2(f)(1) by directing NCSF's legal counsel to research and analyze

the legal issues associated with Durant's campaign activity; and Durant unlawfully directed the

use of non-federal funds to benefit his federal candidacy. *Id.*; *see also* 11 C.F.R. § 300.61.

On September 9, 2011, CSA's President and CEO, Ernestine Sanders, sent an email

(“Sanders email”) to its “partners and friends” inviting them to attend a regularly scheduled

1 "Partner Morning" meeting on September 23, 2011, during which Durant formally announced  
2 his candidacy.<sup>3</sup> See Complaints. Complainant asserts that it is likely that the email was  
3 distributed outside CSA's restricted class; and that the Sanders email constitutes a prohibited  
4 endorsement of Durant's candidacy to the general public in violation of 11 C.F.R.  
5 § 114.4(c)(6)(i) and (ii). Complainant also contends that, given Durant's current position at  
6 CSA, there must have been coordination resulting in the making and accepting of a prohibited in-  
7 kind corporate contribution in violation of 2 U.S.C. § 441b(a). *Id.* Respondents deny that there  
8 was any endorsement or that the communication was coordinated with Durant or the Committee.  
9 Committee Response at 3; Joint Response at 3.

10 Complainant alleges further that CSA funded and aired an advertisement on a cable  
11 television system serving Mackinac Island, Michigan, which is far outside of the Southeastern  
12 Michigan area where CSA operates, on September 10, 2011. Without explaining the basis for its  
13 conclusion or providing any details about the context, such as whether Durant is featured or even  
14 mentioned, Complainant alleges the advertisement was intended to build goodwill for Durant's  
15 state-wide campaign. Original Complaint at 2. We have been unable to locate the advertisement  
16 in publicly available information.<sup>4</sup> The subsequently filed amended and second amended  
17 complaints do not include this particular allegation, and none of the Responses address this  
18 allegation. See Amended Complaint; Second Amended Complaint.

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<sup>3</sup> CSA, in response, explains that an individual meets the definition of a "partner" when he/she donates at least \$2,500 per year to help underwrite a child's education for one year and each partner is teamed with a student with whom they meet during the "Partner Mornings" which are conducted four times per year. *Id.* An individual who meets the definition of a "friend" is someone who contributes to CSA but not at the partner level. *Id.*

<sup>4</sup> In an abundance of caution, CELA contacted the Complainant on several occasions to inquire as to whether he could provide further information regarding the television advertisement, such as a website link. Complainant indicated that he would provide the information but after several follow up telephone calls on CELA's part, Complainant failed to return the calls or provide the requested information.

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1 On September 23, 2011, Durant appeared and spoke at CSA's regularly scheduled  
2 "Partner Morning" meeting, during which he announced his candidacy for U.S. Senate.  
3 Complainant alleges that Durant's appearance at the "Partner Morning" meeting was essentially  
4 a campaign event for which neither Durant nor his Committee paid the usual and normal cost for  
5 the use of CSA's facility as required by 11 C.F.R. § 114.4(c)(7)(i). Complainant contends that  
6 Durant's use of CSA's facility, at no cost to the Committee, constitutes a prohibited in-kind  
7 corporate contribution. However, Respondents replied that the Committee paid \$800 for use of  
8 the facility and that this was the usual and normal cost. Joint Response at 4-5; Committee  
9 Response at 2.

10 On September 26, 2011, the Committee distributed a four page campaign mailer which  
11 included a mention of Durant's prior appearance at the September 23<sup>rd</sup> "Partner Morning"  
12 meeting and a photograph of CSA's kindergartners reciting the U.S. Constitution. Second  
13 Amended Complaint at 3-4, Ex. E. Underneath the photograph is a link to the Committee's  
14 YouTube page that, when accessed, directs the viewer to a video clip of what appears to be the  
15 same CSA's kindergartners reciting the U.S. Constitution. *Id.* Complainant alleges that the  
16 Committee's use of CSA's YouTube video in its campaign mailer constitutes a prohibited  
17 in-kind corporate contribution since the video was funded with CSA's corporate resources, and  
18 the Committee used the video without paying a fair market value. The Complainant also asserts  
19 the use is a potential violation of copyright laws. *Id.* Respondents deny that the Committee's  
20 use of publicly available video footage resulted in a prohibited in-kind contribution. Committee  
21 Response at 2; Joint Response at 5.

1    **III.    Legal Analysis**

2            The Act prohibits corporations from making contributions in connection with a federal  
3 election.<sup>5</sup> 2 U.S.C. § 441b(a). It also prohibits any candidate from knowingly accepting or  
4 receiving any contribution from a corporation, or any officer or any director of a corporation  
5 from consenting to any contribution by a corporation to a federal candidate. *Id.* Federal  
6 candidates and officeholders, including agents acting on their behalf and entities that are directly  
7 estanlished, maintained, financed or controiled by one or more federal candidates or  
8 officeholders, may not solicit, direct, mceive, transfer, spend or disburse non-federal funds.  
9 2 U.S.C. § 441i(e); 11 C.F.R. § 300.61.

10           Commission regulations provide that any incorporated nonprofit educational institution  
11 exempt from federal taxation under 26 U.S.C. § 501(c)(3), such as a school, college, or  
12 university, may make its facilities available to any federal candidate or candidate's  
13 representatives in the ordinary course of business and at the usual and normal charge. 11 C.F.R.  
14 § 114.4(c)(7)(i).

15           Set forth below is our analysis of the specific allegations raised by the complaint.

16           **A.    NCSF's Retention of Counsel**

17           The available information indicates that the funds expended by NCSF to retain counsel  
18 were for the purpose of ensuring its own compliance with the Act and IRS laws given its Section  
19 501(c)(3) status. The Committee Response asserts that Durant and NCSF retained separate legal  
20 counsel to advise them on their differing legal obligations arising out of his candidacy.

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<sup>5</sup> Contributions include any direct or indirect payment, distribution, loan, advance, deposit or gift of money, or any services, or anything of value to any candidate or campaign committee in connection with a federal election. 2 U.S.C. § 441b(b)(2). In-kind contributions must be reported pursuant to 2 U.S.C. § 434(b). The corporate ban on contributions to federal candidates also includes in-kind contributions. 11 C.F.R. § 114.2(c). Corporations and their officers and agents may not use corporate resources to make or facilitate the making of contributions to federal candidates and political committees. 11 C.F.R. § 114.2(f)(1).

1 Committee Response at 2. NCSF responded that it did not pay the firm retained by Durant for  
2 any legal services provided to Durant or his committee, but rather hired its own counsel to  
3 conduct minimal research to determine whether it could continue to compensate Durant as its  
4 President while he was also a candidate. Joint Response at 2.

5 NCSF's use of funds for the purpose of legal advice pertaining to Durant's candidacy  
6 and his continued affiliation with NCSF appears to have been for the benefit of NCSF's own  
7 interests, and does not constitute the making or receiving of a prohibited in-kind corporate  
8 contribution. There is no available information indicating that Durant or the NCSF Board  
9 directed the use of NCSF funds for legal advice to benefit Durant's candidacy, thereby, resulting  
10 in the facilitation of the making of a prohibited in-kind corporate contribution to Durant or his  
11 Committee. Similarly, there is no available information to support the allegation that Durant, as  
12 a federal candidate, unlawfully directed the use of non-federal NCSF funds to benefit his  
13 candidacy.

14 Accordingly, we recommend that the Commission: 1) find no reason to believe that  
15 NCSF and the Committee violated 2 U.S.C. § 441b(a) by making and receiving a prohibited  
16 in-kind corporate contribution, in the form of legal services; 2) find no reason to believe that the  
17 NCSF Board, including Durant, violated 11 C.F.R. § 114.2(f)(1) by facilitating the making of a  
18 prohibited in-kind corporate contribution to the Committee in the form of legal services; and  
19 3) find no reason to believe that Durant, as a federal candidate and NCSF Board Member,  
20 violated 11 C.F.R. § 300.61 by unlawfully directing the use of non-federal funds to provide legal  
21 advice in support of Durant or his candidacy.

**B. CSA's "Partner Morning" Meeting**

The Sanders email advertising the announcement of Durant's candidacy was sent only to those individuals who fell within the category of a "partner" or "friend" that would normally attend CSA's regularly scheduled quarterly "Partner Morning" meeting. Further, it appears that Mrs. Sanders alone was responsible for preparing it without any coordination with Durant or the Committee.<sup>6</sup> See Committee Response at 3; Joint Response at 3. The text of the email, on its face, does not appear to expressly advocate Durant's election or clearly endorse his candidacy. See 11 C.F.R. § 100.22. There is no available information to support a conclusion that the Sanders email constituted an impermissible communication of corporate endorsement in violation of the Commission regulations, or that there was any coordination between the parties as defined by 11 C.F.R. § 109.21.

However, even if CSA did endorse Durant or there is an inference of an implicit endorsement through his appearance, the Act and the Commission regulations do not prohibit a corporation, such as CSA, from endorsing a candidate during a candidate appearance before its restricted class, except to the extent that such activity is foreclosed by provisions of law other than the Act. See 11 C.F.R. § 114.2(a)(1) and 114.4(c)(6); see also MUR 6446 (DeFazio). A corporation is allowed to endorse a candidate, communicate that endorsement to its restricted class through specified publications or during a candidate appearance, and publicly announce the endorsement and the reasons for it. 11 C.F.R. § 114.4(c)(6).<sup>7</sup> Since CSA appears to be a

<sup>6</sup> CSA states that it did not incur any costs to notify its "partners" and "friends" of the Durant's presence at "Partner Morning." *Id.* at 4. However, it estimates that the value of the time Mrs. Sanders spent composing the email would total, at most, about \$85. *Id.* It further asserts that it viewed Durant's appearance in the context of an educational opportunity for the students as indicated by the full text of the email. *Id.* at 3-4.

<sup>7</sup> After the Supreme Court's decision in *Citizens United*, there are no longer any restrictions placed on corporations endorsing and publicly communicating its endorsement of candidates. See *Citizens United v. FEC*, 558 U.S. \_\_\_\_, 130 S. Ct. 876 (January 21, 2010). Although this issue is not within the Commission's jurisdiction, section 501(c)(3) entities are not allowed to "participate in or intervene in, (including the publishing or distributing of



1 membership organization as defined in 11 C.F.R. § 114.1(e)(1), its restricted class would be its  
2 members and executives, or its administrative personnel and their families as set forth in  
3 11 C.F.R. § 114.1(j).

4 CSA's response indicated that the Sanders email, providing notice of Durant's  
5 appearance was sent only to its "partners" and "friends" who were already invited to the "Partner  
6 Morning" meeting and that it issued no press release nor did it invite any media to attend the  
7 meeting. Joint Response at 3-4. Based on the foregoing, it appears that the "Partner Morning"  
8 meeting and any presentation by Durant included only CSA's restricted class as required for  
9 application of 11 C.F.R. § 114.4(c)(6). Further, 11 C.F.R. § 114.2(c) states that disbursements by  
10 corporations for the election-related activities permitted in 11 C.F.R. § 114.4 "will not cause  
11 those activities to be contributions or expenditures, even when coordinated with any candidate,  
12 candidate's agent, [or] candidate's authorized committee . . . ." See 11 C.F.R. § 114.2(c).  
13 Therefore, even if CSA had endorsed Durant in the Sanders email or during his appearance  
14 before CSA's restricted class, such an endorsement would have been permissible under the  
15 Commission's regulations and therefore would not have resulted in a prohibited in-kind  
16 corporate contribution to the Committee in any event.

17 Accordingly, we recommend that the Commission: 1) find no reason to believe that the  
18 CSA and the Committee violated 2 U.S.C. § 441b(a) by coordinating the Sanders email in a  
19 manner that would result in a prohibited in-kind corporate contribution; and 2) find no reason to  
20 believe that CSA violated 11 C.F.R. § 114.4(c)(6)(i) and (ii) by endorsing Durant's candidacy.

21

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statements), any political campaign on behalf of (or in opposition to) any candidate for public office. 26 U.S.C. § 501(c)(3). Commission regulations caution that section 501(c)(3) organizations should consult the Internal Revenue Code regarding any restrictions or prohibitions. There is no available information to indicate whether CSA did so prior to Durant's appearance. See 11 C.F.R. § 114.4(c)(6)

1           **C.     CSA's Television Advertisement**

2           As stated previously, Complainant did not provide any detailed information regarding the  
3     CSA advertisement and the Responses do not address this issue, presumably because it was not  
4     included in the amended complaints. Notwithstanding the Complainant's allegations, there is no  
5     available information to support the assertion that the CSA advertisement constituted a  
6     contribution under the Act. However, based on Complainant's assertion that the advertisement  
7     was aired in order to promote Durant's candidacy, there is no allegation that the advertisement  
8     featured Durant, expressly advocated for his election, was coordinated with the Committee or  
9     constituted an electioneering communication. *See* 11 C.F.R. §§ 100.22, 100.29, and 109.21. In  
10    the absence of any information that would suggest CSA or the Committee violated the Act with  
11    respect to the television advertisement, we recommend that the Commission find no reason to  
12    believe that CSA or the Committee violated 2 U.S.C. § 441b(a) by making or receiving a  
13    prohibited in-kind corporate contribution.

14           **D.     Use of CSA's Corporate Facility for Candidacy Announcement**

15           The available information supports the Respondents' contention that CSA, as a non-profit  
16    educational institution, was permitted to make its facilities available to Durant in the ordinary  
17    course of business at the usual and normal cost and that it, in fact, paid the usual and normal cost,  
18    totaling \$800, for the use of CSA's facilities in conjunction with Durant's appearance at the  
19    "Partner Morning" meeting. Committee Response at 3; Joint Response at 4; *see also* 11 C.F.R.  
20    § 114.4(c)(7)(i). Further CSA states that it would have used its auditorium for its regularly  
21    scheduled "Partner Morning" meeting regardless of Durant's appearance and, therefore, did not  
22    incur any additional costs or make an expenditure associated with his appearance. *Id.* Therefore,  
23    we conclude that the requirements of 11 C.F.R. § 114.4(c)(7)(i) have been satisfied and

1 recommend that the Commission find no reason to believe that the CSA or the Committee  
2 violated 2 U.S.C. § 441b(a) by making or receiving a prohibited in-kind corporate contribution.

3 **E. CSA's YouTube Video**

4 We have reviewed the Committee's campaign mailer which contains the information as  
5 alleged in the complaint. Complaint at Ex. E; *see also* <http://www.youtube.com/clarkdurant>.

6 Although neither the Committee nor CSA make specific reference to the campaign mailer in  
7 their Responses, but rather refer to the videos being placed on the Committee's website, we  
8 conclude that their responses appear to be sufficient to cover the campaign mailer at issue.

9 Committee Response at 2; Joint Response at 5. The available information supports the  
10 Respondents' contention that CSA's videos are publicly available and that the Committee's  
11 decision to post its video was not made in consultation with CSA.<sup>8</sup> *Id.*

12 As to the Committee's assertion that the Commission has recognized that publicly  
13 available information does not raise contribution concerns and has specifically created a safe  
14 harbor to address this type of information in the coordinated communications context, the  
15 complaint does not specifically allege coordination between CSA and the Committee.<sup>9</sup>

16 Committee Response at 2; *see also* Explanation and Justification for *Coordinated*  
17 *Communications and Independent Expenditures*, 71 Fed. Reg. 33,190 (June 6, 2006); 11 C.F.R.  
18 § 109.21(d)(2)-(6). Even if Complainant had alleged coordination with respect to the video  
19 materials, however, it does not appear that the coordination provisions would be applicable in the

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<sup>8</sup> Further, the Committee provides that the videos are posted on YouTube where they are publicly available and its users are provided with tools to allow them to share videos. *Id.*

<sup>9</sup> This "safe harbor" does not apply to the "request or suggestion" conduct standard. *See* Explanation and Justification for *Coordinated Communications and Independent Expenditures* at 71 Fed. Reg. 33,190, 33,205 (June 8, 2006). The Committee, in response, also cites to *FEC v. Public Citizen*, 64 F. Supp. 2d 1327 (N.D. Ga. 1999) (organization's communication supporting a candidate did not qualify as a coordinated expenditure because organization used information disseminated to the public by the campaign). *Id.*

1 present matter because the Committee paid for and distributed the campaign mailer. In addition,  
2 the safe harbor provision is intended to ensure that the use or conveyance of publicly available  
3 information in creating, producing, or distributing a communication would not, in and of itself,  
4 satisfy the conduct standards except for the "request or suggestion" prong. See Explanation and  
5 Justification for *Coordinated Communications* at 33,205. Therefore, we conclude that the  
6 Committee's use of the publicly available information from CSA's YouTube page does not  
7 constitute an in-kind corporate contribution from CSA to the Committee.<sup>10</sup>

8 Accordingly, we recommend that the Commission find no reason to believe that the CSA  
9 or the Committee violated 2 U.S.C. § 441b(a) by making or receiving a prohibited in-kind  
10 corporate contribution with the use of CSA's publicly available YouTube video in its campaign  
11 mailer.

#### 12 IV. RECOMMENDATIONS

- 13 1. Find no reason to believe that New Common School Foundation, its Board members,  
14 The American Way – Durant 2012 and Walter Czarnecki, in his official capacity as  
15 treasurer, and W. Clark Durant violated 2 U.S.C. § 441b(a) or 11 C.F.R.  
16 §§ 114.2(f)(1) and 300.61 in connection with New Common School Foundation  
17 obtaining legal advice regarding Durant's candidacy.  
18
- 19 2. Find no reason to believe that Cornerstone Schools Association and the American  
20 Way – Durant 2012 and Walter Czarnecki, in his official capacity as treasurer,  
21 violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.4(c)(6)(i) and (ii) in connection with  
22 an email advertising the event at which W. Clark Durant announced his candidacy.  
23
- 24 3. Find no reason to believe that Cornerstone Schools Association and The American  
25 Way – Durant and Walter Czarnecki, in his official capacity as treasurer, violated  
26 2 U.S.C. § 441b(a) by making or receiving a prohibited in-kind corporate contribution  
27 in the form of a CSA television advertisement.  
28
- 29 4. Find no reason to believe that Cornerstone Schools Association and The American  
30 Way – Durant 2012 and Walter Czarnecki, in his official capacity as treasurer,  
31 violated 2 U.S.C. § 441b(a) by allowing W. Clark Durant the use of its facility at less  
32 than the usual and normal cost.

<sup>10</sup> For purposes of this Report, we will not reach any conclusion with respect to the copyright allegations since this issue does not fall within the Commission's jurisdiction.

5. Find no reason to believe that Cornerstone Schools Association and The American Way – Durant 2012 and Walter Czarnecki, in his official capacity as treasurer, violated 2 U.S.C. § 441b(a) by the use of Cornerstone Schools Association's publicly available YouTube video in the Committee's campaign mailer.
6. Approve the appropriate Factual and Legal Analyses.
7. Approve the appropriate letters.
8. Close the file.

Anthony Herman  
General Counsel

Daniel A. Petalas  
Associate General Counsel for  
Enforcement

Mark Shonkwiler  
Assistant General Counsel

Kimberly D. Hart  
Staff Attorney